Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

COMMERCIAL ENERGIES, INC.,

Petitioner,

v.

RICHARD J. DANZIG, SECRETARY OF THE NAVY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Government Contractor's right to damages wrongfully and improperly determined when an Administrative Board finds that entitlement exists under the terms of the Contract but then applies a theoretical test for quantifying the damages, contrary to the terms of the Contract and contrary to the filed rate doctrine?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding. Petitioner, Commercial Energies, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock. The Secretary of the Navy is the official representative of the United States of America.

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Petitioner, Commercial Energies, Inc., respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported as *Commercial Energies, Inc., v. Richard J. Danzig, Secretary of the Navy*, Appendix A. The opinion of the Armed Services Board of Contract Appeals in Appeal of Commercial Energies, Inc., can be found at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on March 10, 1999. This Petition for Writ of Certiorari is timely filed within ninety (90) days from the date judgment was entered.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This Petition concerns damages due Petitioner, Commercial Energies, Inc., under a Requirements Contract for the supply and transport of natural gas. This Contract represented the first time Respondent had ever purchased natural gas and transportation on an interstate pipeline other than directly from a regulated utility. This Contract came about as a result of natural gas deregulation in 1987 and 1988. The Respondent had never awarded or administered

a Contract which involved pipeline tariffs and change in tariff rates. The tariff by which the transportation cost adjustment was to be calculated does not incorporate references to the Contract price between the parties nor does the tariff make any distinction between the cost of gas delivered to the customer and the cost of gas used for calculating a transportation cost adjustment. The Contract specifies that the Contractor is to be paid transportation costs based on the tariff rate set by the Federal Energy Regulatory Commission (FERC).

The Contract contained three clauses bearing on the transportation cost adjustment: C.4, H.10 and H.14[1]. In the

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1. Clause C.4: *Development of Government Pricing Structure*, a. Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless one of tow following situations arises: First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state, or local regulatory authority. Offerors are advised that price adjustments will not be made due to the inability to obtain a transportation discount when such a discount is reflected in Section B unit prices. Second, city gate prices may be adjusted during the contract period if the comparable price for delivery to the DOD installation exceeds the ceiling price for natural gas as defined in Section H.09. This should occur because of an increase in transportation rates, a decrease in the otherwise applicable local distribution company tariff, or a combination thereof. In such instances, the Government will cease orders or nominations of gas for as long as the ceiling price is exceeded. Contractors at their sole option, however, may adjust unit prices so that the ceiling price is no longer exceeded (Cont'd)

(Cont'd)

and the Government will then resume gas ordering. The redetermined price will apply for a period of time as specified by the contractor or the expiration of the contract period, whichever occurs first. b. Title to offeror's gas shall be transferred no sooner than delivery at the city gate, and transportation to the city gate will be arranged by and provided on behalf of the offeror. The Government will be responsible for transportation from the city gate by North Shore. Offerors will be required to assist the Government in securing such transportation service.

Clause H.10: *Ceiling Cost for Natural Gas*, The Government is not required to order gas under this contract if such orders require payments to the contractor and to transporters in any month for natural gas consumed that would be greater than the "Ceiling Cost" for natural gas. The Ceiling Cost will be 95.0 percent of the tariff cost per North Shore Service Classification 2 and 3, or their equivalent. Contractor's "Comparable Price" for purposes of Ceiling Cost comparisons shall be the sum of contractor's applicable Section B city gate price plus all applicable transportation rate and demand rate payable to North Shore.

Clause H.14: *Transportation Price Adjustments*, a. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply: (1) If during the term of this contract the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the Section B transportation prices, the Contracting Officer shall amend the contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective. (2) If during the term of this contract an application is made to revise the tariff governing transportation services, the contractor shall promptly notify the Contracting Officer and provide a copy of such applications, petitions, revised schedules, or approved tariffs to the Contracting Officer. b. In the event transportation service from the city gate is to be provided by other than North Shore, the contractor shall specify a rate for such service in terms of cents per decatherm. This rate shall remain fixed during the applicable contract period.

first hearing addressing entitlement only, the Armed Services Board of Contract Appeals (ASBCA) held that Petitioner was entitled to lost profits for breaches of Contract by the Government which prevented Petitioner from transporting gas in November 1989 and July 1990. Further, the ASBCA held that the amount of damages due for the transportation price adjustment for each month in which a FERC tariff revision occurred was to be measured by the documented tariff revision(s). At this point, the ASBCA was in agreement with the filed rate doctrine first upheld by the Supreme Court in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). The filed rate doctrine provides that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged. Later, the Supreme Court expanded this doctrine to hold if Congress grants exclusive authority over rate regulation to a federal regulatory body, then under the "filed rate" doctrine, no rate other than the one on file may be used because this would usurp a function assigned to a federal regulatory body. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 57, 101 S. Ct. 2925, 69 L. Ed. 20856 (1981).

Petitioner seeks recovery of the unpaid balance due on its Contract relating to the difference between the Contract price for transportation prices and the amount for transportation prices as set by FERC's tariff rates. In order to determine this difference, and whether there is any affect on actual cost, it is necessary to compare what Petitioner has been paid with what Petitioner is entitled to be paid per published tariff rates. Such a computation can be accomplished in a straightforward manner and does not require use of theoretical rates as applied by the ASBCA.

After a second hearing, which addressed Quantum (damages), the ASBCA issued its Opinion which held that the Petitioner had not submitted proof of actual costs paid to all of its natural gas suppliers, which in the Board's mind would have been the most direct evidence by which the Transportation Price Adjustment could be determined. (App. B, P.25a) Clause 4 in the Contract did not require Petitioner to submit those costs which the ASBCA found would constitute the most direct evidence. The Contract required Petitioner to submit copies of the tariff revisions for the months in which transportation costs either increased or decreased and to make adjustment in the price Petitioner had been paid for such transportation costs by the Government as stated in the Contract.

The ASBCA did not explain why it had changed the test from that stated in the Entitlement Decision, *i.e.* to determine the transportation price adjustment for each month in which a tariff revision made by FERC had occurred. Petitioner's costs to its suppliers had never been subjected to Audit at Respondent's request. Nor had either party to the Contract ever interpreted that the Contract called for Petitioner to produce proof of actual costs paid the suppliers. To the contrary, Petitioner presented that proof specified both by Clause 4 and recognized by ASBCA: evidence of tariff revisions made by FERC per copies of the documented tariff revision(s).

The ASBCA erred in finding that neither party presented the most direct evidence when Clause C.4 did not require such evidence. Petitioner presented expert testimony from two experts that the method used by Petitioner complied with the natural gas industry standard for calculating a Transportation Cost Adjustment. The

Federal Circuit Court of Appeals upheld the ASBCA's Quantum methodology by upholding use of a comparison of "theoretical" transportation charges which were in effect at the time of Contract award with the theoretical transportation charge at the time of each gas delivery. As a result of such a comparison, the ASBCA calculated an adjustment of $1,145.79. Petitioner's calculations, based on the FERC tariff revisions, resulted in $277,902.25 due for the transportation price adjustment. (App. B, p. 20a) Respondent's calculations resulted in $253,000 due Petitioner. The Federal Circuit Court of Appeals found that substantial evidence supported the theoretical transportation rates used by the ASBCA and affirmed the quantum decision awarding $1,145.79 to Petitioner. (App. B, p. 24a and App. A, p. 10a)

Affirming the Quantum Decision was erroneous as a matter of law because the Contract Clause C.4 specified that tariff revisions made by FERC were to be used, not theoretical transportation rates, which were used by ASBCA. Further, there was no substantial evidence in the record which supported the theoretical rates. To the contrary, two industry experts testified that the method employed by Petitioner was in compliance with industry standards. If the ASBCA intended to use theoretical rates, those rates should have been determined in compliance with the industry standard for calculating such costs. The Federal Circuit Court of Appeals did not detail what substantial evidence it relied upon from the record. The record is devoid of any testimony supporting the use of theoretical rates.

The second element of Quantum — recovery for lost profits — was denied by the ASBCA as well because the ASBCA found Petitioner did not present proof of its

damages for lost profits. In the Entitlement Decision, the ASBCA held that lost profits should be measured by the difference in Contract price for the natural gas and the actual price paid for the gas. This method was altered by the Quantum Decision which held that lost profits should be determined by the difference between the Contract price and all costs Petitioner incurred to deliver gas. The Federal Circuit Court of Appeals upheld the Quantum Decision because it could determine no basis to find an abuse of discretion by the ASBCA. (App. A, p. 7a)

Petitioner's contract was a Requirements Contract which obligated Respondent to purchase all of its gas exclusively from Petitioner during the six-month base period with two six-month option periods. If Petitioner's delivery of gas was curtailed or interrupted, the North Shore Gas Company (North Shore), a local supplier to Respondent, would stand by to make up any deficiency in the supply of natural gas. Respondent purchased natural gas from North Shore during several months while Petitioner's contract was in effect. The test applied to determine if a breach had occurred addressed three scenarios: (1) when Petitioner was "bumped off" the natural gas pipeline; (2) when an illegal daily cap was applied; and (3) when the Petitioner elected not to furnish gas beyond the amount stated in the requirements. When any of these scenarios occurred, then the Government could purchase gas from North Shore. The ASBCA found Petitioner was prevented from delivering gas in November 1989 and July 1990 due to North Shore's daily cap. Thus, Petitioner was entitled to lost profits for those two months. In addition, Petitioner maintained from documents, obtained after the Entitlement Hearing, that the Government breached the contract in December 1989 by purchasing gas from People's Gas, Light & Coke (PGLC)

because the documents showed the Government purchased gas every day in the month of December 1989 from PGLC and not just the three (3) days in December when Petitioner was bumped off line.

Both the ASBCA and the Federal Circuit applied the wrong test for measurement of lost profits. The proper test is to determine the volume of gas purchased during the month in issue and then multiply the volume by the difference between the cost and contract price. The record contained the necessary financial data to make such a calculation. In fact, the parties' Stipulated Exhibits before the ASBCA substantiated the basis for the required calculation.

The ASBCA exhibited inability to arrive at a jury verdict determination of lost profits but was able to calculate, on a theoretical basis, damages for the transportation cost adjustment. The jury verdict technique is often used to determine the amount due a contractor when there are gaps in the evidence or the evidence is not completely persuasive. *Cibinic & Nash*, Administration of Government Contracts, Third Edition (1995) pp. 719-721. Where there is some evidence upon which a jury verdict could be based, it is error to deny a contractor's claim in its entirety when entitlement was established. *S.W. Electronics & Mfg Corp. v. United States*, 228 Ct. Cl 333, 655 F.2d 1098 (1981).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR RULINGS ON THE FUNDAMENTAL RIGHT OF A LITIGANT TO RECOVER DAMAGES DETERMINED UNDER THE FILED RATE DOCTRINE.

In *Freeman Gen., Inc. v. United States*, 918 F.2d 188 (Fed. Cir. 1990) the Federal Circuit Court of Appeals reversed a board decision that denied any recovery of damages due to lack of evidence from the Contractor proving the amount of the adjustment. The Federal Circuit held that it was error not to award a jury verdict in the amount of the Government's estimate of the value of the claim — which was in the evidence submitted to the Board. In the case at bar, the evidence consisted of Stipulated Exhibits from both parties. These Stipulated Exhibits contained undisputed information by which both lost profits and the transportation cost adjustment should have been calculated. This Court has recognized the same concept in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931). Lack of mathematical precision should not deprive the contractor of cost recovery where entitlement exists.

Petitioner presented its computation in accord with the ASBCA's finding in the entitlement opinion, *i.e.*, the tariff revision declared by FERC during the time gas deliveries were being made as documented by the revised tariffs. The ASBCA changed from this test to one requiring the most

direct evidence, *i.e.*, proof of payment by Petitioner to its suppliers. The Federal Circuit found this newly imposed standard of comparing theoretical transportation rates at time of award with those at time of delivery was not an abuse of discretion.

Petitioner maintains use of such theoretical rates was indeed an abuse of discretion for several reasons. First, Clause C.4 of the Contract did not require proof of supplier costs. Second, the contract price was the price which the Petitioner was to be paid by Respondent, regardless of what price Petitioner paid to its suppliers. The Federal Circuit stated that the contract price is the price paid by the Navy to Commercial Energies, Inc., not by Commercial Energies, Inc., to its suppliers. (App. A, p. 9a) If the Respondent wanted verification of what price Petitioner was paying its suppliers, then the Contract should have so stated this requirement. This Contract did not. Further, if the Respondent had any questions about the actual cost of transportation paid due to changes in the applicable tariffs, then the Respondent had the ability to audit payments to suppliers. The Respondent did not do so. To require Petitioner to prove up what costs were paid to its gas suppliers as a condition precedent to recovery is contrary to the test established in the Entitlement Decision which only required Petitioner to show FERC tariff revisions which affected transportation cost.

Third, the ASBCA had before it uncontroverted testimony from two gas industry experts who both verified that Petitioner had calculated the transportation cost adjustment in accordance with industry standards. Neither the ASBCA nor the Federal Circuit stated any rationale for rejecting this substantial evidence which supported Petitioner's claimed costs of $277,902.50.

The Contract clauses, C.4 and H.14, bearing on the Transportation Price Adjustments, clearly do not spell out the test applied by ASBCA and affirmed by the Federal Circuit. The best evidence as interpreted by ASBCA would place an extracontractual burden upon Petitioner. The phrase "affect the actual cost of transportation" did not equate, in the Entitlement Decision, to the requirement of showing actual costs paid to Petitioner's suppliers, as a component of any transportation price adjustment. If the ASBCA intended to impose that test, then that test should have been outlined in the Entitlement Decision. It was not. To the contrary, comparing the tariff in effect at time of bid with the final tariff revisions and subtracting the actual amounts paid to Petitioner by the Government is the only way damages can be properly determined.

Petitioner had no way of knowing that the test would be changed from proving up documented tariff revisions and the effect those revisions would have on the actual cost of transportation. Instead, Petitioner was held to a different test in its proof. Such action is contrary to the filed rate doctrine established by this Court.

II.

THE PETITION SHOULD BE GRANTED BECAUSE USE OF A THEORETICAL BASIS TO CALCULATE DAMAGES DEPRIVES A LITIGANT OF RELIANCE ON CONTRACTUAL STANDARDS FOR MEASUREMENT OF DAMAGES.

Petitioner maintains that an abuse of discretion has occurred as a result of the ASBCA decision, which was affirmed, because damages have been determined contrary

to the terms of the Contract and contrary to the test established in the Entitlement Decision.

Petitioner's transportation price was to be based upon a published tariff from FERC. This rate established by the tariff was contractually specified as being the governing standard by which any adjustment in transportation price would be determined. The ASBCA recognized this standard in the Entitlement Decision. The tariff imposed upon Petitioner not only the right, but the absolute duty to charge and collect at such rate, and a like duty to pay its suppliers. If there was any doubt or questions about whether Petitioner had, in fact, paid its suppliers, then an audit should have been performed by the Respondent.

When the Government contracts for transportation and delivery of natural gas, the Government is bound by the same rules that govern contracts entered into between private parties. *Standard Oil of New Jersey v. United States*, 267 U.S. 76, 45 S. Ct. 211, 69 L. Ed 579 (1925) Accordingly, Petitioner's right to recovery at the tariff rate cannot be circumvented or abridged by use of a theoretical rate. The ASBCA and Federal Circuit seek to employ an implied in-fact limitation (the amount paid to suppliers) not expressly set forth in the Contract. In effect, their position represents an attempt to vary the published tariff in question by comparing it to the suppliers' price to Petitioner. Petitioner is not seeking to recover on the basis of an implied in-fact price. Petitioner seeks to recover on the basis of tariff rates which have been established by FERC. Tariff rates were recognized in the Entitlement Decision as the proper standard to measure transportation price adjustment(s).

Since one element of Petitioner's contract dealt with a transportation price factor, which was not controlled by either party to the contract, the price of transportation was to be handled in the same manner as an equitable adjustment. If the tariff rate went up or down, the Petitioner's recovery would be adjusted accordingly. To the extent that another agency (FERC), not a party to the contract, controlled the element of transportation price, then there is a fundamental difference in cost impacts upon both the user and the procuring party. That fundamental difference means that the tariff rate once formally published becomes binding upon both parties, regardless of any other consideration or attempts to evade them, innocently or otherwise.

In the field of transportation, both parties are charged with knowledge or notice of the published rate and that rate is by law a part of the contract. Contracts containing a rate other than the tariff rate cannot be enforced in the Courts as to such illegal rate, nor can recovery be allowed for breaches of the rate provision of such a contract. Strict adherence to that doctrine by the Courts may appear unfair to the individual user or shipper, in view of principles of equity and justice, since the shipper to whom the illegal lower rate has been granted may enter into a contract with others, in ignorance of the established rate. Requiring such a shipper to pay the higher rate, established by the approved tariff, may result in significant loss to the shipper. However, the Courts have uniformally allowed collection at the higher published rate, regardless of the negligence or actual fraud in quoting a lower rate, since otherwise the public policy designed to benefit the public as a whole would be undermined. *Hughes Transportation, Inc. v. United States*, 121 F. Supp. 212 (Ct. Cl. 1954).

The ASBCA's use of theoretical rates, as found by the Federal Circuit Court of Appeals, constituted an abuse of discretion because its action abrogated the pricing scheme set forth in the Contract. Such action also violated the filed rate doctrine which can only be modified if the rate is shown to be unreasonable. *Keogh*, *supra* at 163. No findings were made nor was any proof submitted on the issue of unreasonableness before the ASBCA. Accordingly, the ASBCA's substitution of theoretical rates violated the filed rate doctrine.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW WILL HAVE A SIGNIFICANT EFFECT UPON FEDERAL PROCUREMENT BY ENABLING AN ADMINISTRATIVE BOARD TO USURP A RATE-MAKING FUNCTION EXCLUSIVELY ASSIGNED BY CONGRESS TO FERC.

Petitioner incorporates by reference its citations set forth under "Statement of the Case" which required the ASBCA and the Federal Circuit Court of Appeals, under the "filed rate" doctrine, to apply FERC's published rates. In addition to that doctrine, however, Petitioner maintains that allowing the decision affirmed below to stand will cause a significant effect upon other government contractors who rely upon contractual terms to establish measurement for payment.

The purpose of Contract Clauses C.4 and H.14 is evident from the Contract language. Clause C.4 obligates the Contractor to a fixed price for gas delivered to the City

Gate unless the regulatory authority changes the tariff and this change affects the actual cost of transportation to the City Gate. The baseline against which to measure the affect of any change in the tariff rates was the fixed price upon which the Contract was based. This evidence established that the bid price for transportation was $.32521 per decatherm. Petitioner was paid throughout performance at this price. FERC's tariff rates were established at a later time. The two industry experts explained that the natural gas industry had arrived at an established formula for measurement of increases/decreases in transportation prices caused by tariff rate changes. Instead of using the Contractor's bid rate for transportation costs, the experts calculated the stipulated tariffs revised by FERC in each month in which transportation costs were either increased or decreased. Then, these costs were measured against the price which Petitioner had been paid which resulted in quantum of $277,902.25 due Petitioner for the adjusted transportation price changes.

The ASBCA penalized Petitioner by ignoring expert testimony, by disregarding the Respondent's quantum calculations, and ultimately by using a new and different test by which to evaluate quantum.

Government contract law clearly recognizes that a contractor's proof of damages does not have to be always subjected to the standard of proof requiring actual costs unless there is a contract clause recognizing the requirement for such actual costs. In *Northern Helex Co. v. United States*, 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert. denied*, 428 U.S. 866 (1976), the Court held at pp. 875-76:

> The basic rule for awarding common law damages for a breach of contract is stated as follows in *Restatement of Law*, Contracts, § 329(a):
>
> In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the least cost to the Defendant and without charging him with harms that he had no sufficient reason to foresee when he made the Contract . . .

In *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 351 F.2d 956 (1965), the Court held the standard of proof is satisfied if a reasonable basis for computation of the amount is established by stating:

> A claimant need not prove his damages with absolute certainty or mathematical exactitude . . . [cites omitted]. It is sufficient if he furnishes the court with a reasonable basis for computation . . . [cites omitted]. Yet this leniency of the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation and resultant injury . . .

The contractor's burden of proof to establish entitlement appears to be more strictly enforced than the burden of proof relating to damages, or quantum. Petitioner met its burden and convinced the ASBCA entitlement existed. Petitioner also met its burden of proof by providing a reasonable basis for computation of the amount of damages. Petitioner

offered proof as required by the contract and as required by the Entitlement Decision. In addition, Petitioner offered proof from two experts in the natural gas industry. The ASBCA had before it sufficient evidence on which to base a quantum award not based on jury verdict methodology. Yet the Quantum Decision was based on a jury verdict which used theoretical rates. This was error as a matter of law because the ASBCA and Federal Circuit did not make the appropriate findings necessary for jury verdict methodology: (1) there was clear proof the contractor was injured; (2) there was no more reliable way of computing damages; and (3) the evidence was sufficient to make a fair and reasonable approximation of damages. *WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968).

No findings were made on any of those factors, and yet a jury verdict was rendered based on theoretical charges.

Damages for loss of profit were denied altogether, despite the Entitlement Decision upholding liability for such lost profits. Petitioner maintains sufficient evidence existed in the record before the ASBCA to make a jury verdict determination, similar to what occurred on the transportation price adjustment.

There can be no doubt that Petitioner suffered injuries for which damages are due. Petitioner's proof constituted reasonably adequate data which should have been used in the manner specified in the Contract and so recognized in the Entitlement Decision. Disregarding such information violates Petitioner's right to receive damages as relief for established entitlement issues.

CONCLUSION

It is curious that neither the opinion from the ASBCA (App. B) nor the Opinion from the Federal Circuit Court of Appeals (App. A) contain any citation of case law. Without any precedent being given for the use of theoretical rates, Petitioner is placed at a severe disadvantage in attempting to discern what legal basis exists for either Opinion. Given the "filed rate" doctrine, and the implications that flow therefrom, it is very clear that an abuse of discretion has occurred when the tariff rate set by FERC was not applied. Giving such deference to theoretical rates violated the filed rate doctrine, which requires use of the filed rate. Moreover, both the ASBCA and the Federal Circuit have misconstrued what financial data should be examined to determine if the change in tariff rate has affected the actual cost of transportation. Petitioner's supplier costs have no relationship to whether Petitioner's payments under the Contract were made in compliance with tariff rates set by FERC during the life of the Contract. Mathematically, there must be a cost baseline against which tariff revisions can be compared. This baseline requires payments made under Petitioner's Contract to be compared to FERC's tariff rates and applied to the volume of gas delivered. This is the methodology used by Petitioner and validated by two (2) experts in the natural gas industry.

Similarly, calculation of lost profits should be premised upon putting the Petitioner in as good a position as it would have been if no breach had occurred. The purpose of a Requirements Contract is to commit purchase of a definite quantity of gas unless Petitioner is unable to furnish said quantity. Petitioner's supply was only curtailed three (3)

days in December, 1989. Yet Respondent ordered from another supplier every day in December. For the other two (2) months in which a breach occurred, Petitioner provided sufficient proof for determination of lost profits by subtracting the costs paid from the prices charged for the volume of gas furnished.

Certiorari should be granted to correct the errors described herein.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED MARCH 10, 1999

United States Court of Appeals for the Federal Circuit

98-1340

COMMERCIAL ENERGIES, INC.,

Appellant,

v.

RICHARD J. DANZIG, SECRETARY OF THE NAVY,

Appellee,

DECIDED: March 10, 1999

Before RICH, NEWMAN, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

Commercial Energies, Inc. (CEI) sought compensation under its contract to supply the Great Lakes Naval Training Center with natural gas over a period of eighteen months. On appeal to the Armed Services Board of Contract Appeals, the Board (1) found that the Navy breached the contract in two of the months, but denied any recovery to CEI for failure to prove its damages; (2) found that the Navy did not breach the contract in a third month; and (3) awarded CEI an adjustment under the contract for changes in the transportation tariffs for natural gas. Because CEI has not shown any reversible error by the Board, this court *affirms*.

Appendix A

I.

A.

On March 24, 1989, CEI contracted with the Great Lakes Naval Training Center to supply its natural gas requirements for a six-month base period with two six-month option periods. The contract required the Navy to specify an amount of gas required from CEI at least ten days in advance of each month. CEI arranged to have the natural gas transported through a gas pipeline owned by the Natural Gas Pipeline Company of America (NGP) to a delivery point known as the "City Gate." The Navy contracted with the local gas supplier, North Shore Gas Company (North Shore), to transport the gas from the City Gate into the Training Center. That contract set a daily "cap" on the amount of natural gas that any particular supplier could send through North Shore's distribution system.

In an August 5, 1996 decision, the Board found that this daily cap on occasion prevented CEI from transporting gas to meet the Navy's forecast. Because the Navy had entered into the contract with North Shore without CEI's knowledge, the Board concluded that, to the extent the daily cap caused CEI's gas shipment shortfalls, the Navy breached its contract with CEI. In reaching that conclusion, the Board analyzed the relevant contract provisions. Section C.6 of the contract, entitled "Natural Gas Requirements," provides: "The government shall purchase natural gas . . . exclusively from [CEI] or [North Shore] during the term of this contract." Attachment B, Rider 16 to the contract further provides: "In the event of an *interruption or curtailment* of deliveries of [CEI]-owned gas supply to [North Shore],

[North Shore] will stand by to make up any deficiency in such supply."

The record shows that the Navy purchased natural gas from North Shore in several months during the life of the Navy's contract with CEI. To determine whether these purchases constituted a breach, the Board looked to whether the Navy bought gas from North Shore because of an "interruption or curtailment" of CEI-owned gas. The Board interpreted that phrase to encompass two situations: first, when CEI was "bumped" off NGP's distribution network[1] and, second, when the Navy's actual gas usage exceeded its estimate in a given month. In either of those situations, the Navy could purchase gas from North Shore rather than CEI. The Board further determined, however, that "interruption or curtailment" did not encompass the situation where North Shore's daily cap prevented CEI from delivering gas to the Training Center.

Applying this interpretation, the Board found that North Shore's daily cap only prevented CEI from delivering gas in November 1989 and July 1990. Accordingly, the Board found the government in breach of its contract with CEI for those months. The parties agreed that the measure of damages for that breach was CEI's lost profits for the gas it

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1. NGP provided two types of transportation services to customers: firm and interruptible. "Firm" service guaranteed delivery and space on the pipeline. A customer with "interruptible" service could be "bumped" off the pipeline by "firm" service customers when weather constraints limited NGP capacity. CEI's supplier of natural gas had contracted with NGP for "interruptible" service.

could not deliver because of the daily cap. The Board held a hearing to determine this amount.

At the quantum hearing, CEI submitted evidence of its lost profits for November 1989 and July 1990. CEI also asserted, based on documents it obtained after the Board's entitlement decision, that the government breached the contract in December 1989 by purchasing gas from another company, People's Gas, Light, and Coke (PGLC). The Board found that CEI had not met its burden of proving either lost profits for November and July, or that the government breached the contract in December. CEI appeals both decisions.

B.

CEI also appeals another portion of the Board's quantum decision relating to a "transportation rate adjustment" under the contract. As bid, the so-called "City Gate" price of natural gas consists of the price of the gas itself plus the price to transport the gas through NGP's pipelines to the City Gate. CEI contracted a fixed transportation price of $.32521 per decatherm of natural gas.

The Federal Energy Regulatory Commission (FERC) is the body responsible for setting transportation tariffs for natural gas. After the contract was awarded, FERC approved revised transportation tariffs effective retroactively during the term of the contract. The contract, however, provided for such a contingency. Read together, the following sections state that, if the appropriate regulatory commission

(i.e. FERC) authorizes a change in the transportation tariff, and the change affects the actual cost of transportation to the City Gate, CEI will be due a transportation rate adjustment from the Navy.

C.4 DEVELOPMENT OF GOVERNMENT PRICING STRUCTURE

(a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . . .

First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, *provided that such changes affect the actual cost of transportation to the city gate.* The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority . . . .

H.14 TRANSPORTATION PRICE ADJUSTMENTS

A. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply:

(1) If during the term of this contract the appropriate regulatory commission authorizes an

> increase or decrease in the tariff supporting the Section B transportation prices the Contracting Officer shall amend this contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective.

Thus, in its entitlement decision, the Board granted CEI a transportation rate adjustment because FERC revised the applicable transportation rates during the life of the contract. Because section C.4, above, required that changes in the transportation rate "affect the actual cost of transportation," the Board required CEI to show its actual costs before awarding any transportation rate adjustment. For several natural gas deliveries, the Board found that CEI submitted no evidence of its actual costs, and thus disallowed any recovery for those deliveries. As to the remaining gas deliveries, the Board found that the best way to determine how CEI had been affected by the tariff rate revisions would be "the documented payment by CEI of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions." *Commercial Energies, Inc.*, ASBCA No. 50316, 98-1 BCA ¶ 29,549. The record, however, contained no such evidence. Lacking such evidence, the Board compared instead the "theoretical" transportation charge at the time of contract award with the "theoretical" transportation charge at the time of each gas delivery. From this comparison, the Board calculated an adjustment of $1,145.79. CEI appeals the Board's methodology.

Appendix A

II.

This court will reverse the Board's decision if it is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b) (1994). Contract interpretation, however, is a matter of law that this court reviews *de novo*. *See Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996).

A. *Quantum for Breach of Contract*

At the quantum hearing for the November 1989 and July 1990 breaches, CEI sought lost profits measured by the difference in the contract price for the natural gas and the actual price CEI paid for the gas (i.e. gross profit). The Board, however, determined that CEI was only entitled to the difference between the contract price and *all* costs CEI incurred to perform and deliver the gas to the Navy (i.e. net profit). CEI's president testified that, in addition to the costs it incurred for purchasing and transporting the natural gas, it incurred "management" costs and "a whole bunch of other things." Because the record contained no evidence of these other costs, the Board denied CEI any recovery.

This court cannot say that the Board abused its discretion in limiting CEI's recovery to net profits. Allowing CEI to recover its gross profits would potentially overcompensate CEI for any harm it suffered.[2] As to the

2. Even using CEI's proposed methodology, this court cannot substantiate the amount of profit CEI claims. For example, CEI (Cont'd)

evidentiary deficiencies, CEI points to nothing in the record allowing the calculation of net profits. Accordingly, this court affirms the Board's decision to deny CEI any recovery for the Navy's November 1989 and July 1990 breaches.

B. *Breach of Contract for December 1989*

CEI claims that the Board erred in finding that the Navy did not breach the contract in December 1989. CEI bases its argument on documents it interprets to show that the Navy purchased in December a significant amount of gas from PGLC, which is not a contract-authorized source of gas. The Board, however, specifically found that CEI did not prove any Navy purchase of gas from PGLC in December, and that the Navy had no contract with PGLC to supply gas. The Board also found that PGLC merely owned the meters that measured the gas North Shore supplied to the Navy, which explains why the documents relied on by CEI to show deliveries by PGLC bear the "Peoples Gas Light Coke" name. CEI does not challenge this finding.

In its reply brief and during oral argument, CEI argued that even if the Navy purchased the gas from North Shore, not PGLC, it still breached the contract. To the contrary, however, not every Navy purchase of gas from North Shore

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(Cont'd)
states in its brief that its July 1990 contract price for gas was $1.85 per decatherm and that its corresponding cost was $1.65 per decatherm, yielding a profit of $0.20 per decatherm. Yet, CEI claims it is entitled to a profit of $.52521 per decatherm for that month.

constitutes a breach. The contract authorizes the Navy to purchase gas from North Shore when CEI is bumped off the NGP line, or when the Navy's actual gas usage exceeds its forecast for the month. Under the Board's interpretation, which this court finds reasonable, the Navy was only held in breach when North Shore's daily cap prevented CEI from supplying gas to the Navy. CEI points to no evidence that North Shore's daily cap affected the amount of gas CEI delivered in December. For these reasons, this court affirms the Board's finding that the Navy did not breach the contract in December 1989.

C. *Transportation Rate Adjustment*

CEI assigns error to the Board's methodology in calculating a transportation rate adjustment of $1,145.79. CEI asserts that the Board should have measured the transportation rate adjustment by comparing the revised FERC tariff rates with the amount the government actually paid CEI for transportation of the gas (i.e. the transportation price set forth in the contract). That method yields a transportation rate adjustment of $277,902.25.

CEI's proposed method, however, overcompensates CEI for changes in the FERC tariffs. The contract provisions providing for a transportation rate adjustment account for any changes in the actual cost of transportation paid by CEI due to changes in the applicable transportation tariffs. CEI's comparison of the revised tariff rates to the *contract price* for transportation bears no relationship to this purpose. The contract price is the price paid by the Navy to CEI, not by CEI to its suppliers.

Instead, as the Board noted, the actual effect of the tariff revisions on CEI would best be shown by evidence of payments by CEI to its suppliers of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions. Because the record contained no such evidence, the Board attempted to approximate this amount by comparing the theoretical transportation rates at the time of contract award (based on the then-applicable FERC tariffs) with those at the time of delivery (based on the revised FERC tariffs). This court can discern no abuse of discretion in the selection of this methodology, which adequately captures the effect of the tariff revisions on CEI. Moreover, substantial evidence supports the theoretical transportation rates used by the Board. Accordingly, this court affirms the transportation rate adjustment awarded CEI.

APPENDIX B — OPINION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS BY ADMINISTRATIVE JUDGE JAMES DATED JANUARY 26, 1998

ARMED SERVICES BOARD OF
CONTRACT APPEALS

ASBCA No. 50316

Appeal of —
Commercial Energies, Inc.
Under Contract No. N62472-88-D-0817

* * *

OPINION BY ADMINISTRATIVE JUDGE JAMES

With respect to entitlement, we sustained the contractor's appeal on three claim elements: (1) breach of the captioned requirements contract by purchase of natural gas from another source; (2) calculation of the ceiling cost adjustment; and (3) transportation cost adjustment. *Commercial Energies, Inc.*, ASBCA No. 47106, 96-2 BCA ¶ 28,474. The parties resolved the ceiling cost adjustment issue, but were unable to agree upon quantum for the breach and transportation cost adjustment. We reinstated the appeal and assigned docket No. 50316 to these quantum issues. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a two-day hearing in Denver, Colorado, the parties submitted post-hearing briefs.

Appendix B

FINDINGS OF FACT

Familiarity with the Board's decision on entitlement, 96-2 BCA ¶ 28,474, is assumed. However, for convenience we summarize some of our previous background findings.

1. On 24 March 1989 the parties entered into Contract No. N62472-88-D-0817 (contract 817) to supply natural gas, classifications 2 and 3, to the "City Gate" near the Great Lakes Naval Training Center (GLNTC) for a six-month base period, with two six-month option periods (ASBCA 47106, finding 1).

2. The "City Gate" was the point of delivery of gas from the Natural Gas Pipeline Company of America (NGP) into the North Shore Gas Company's (NSGC) local distribution system at Grayslake, Illinois, also termed delivery point "A-20" or "M-20" (ASBCA 47106, findings 1, 33).

3. Contract 817 specified the following unit prices per decatherm for the base period and the two option periods:

Period	Gas	+	Transportation	=	Total Price
3/24/89 to 9/23/89	$1.75		$0.32521		$2.07521
9/24/89 to 3/23/90	$2.30		$0.32521		$2.62521
3/24/90 to 9/23/90	$1.85		$0.32521		$2.17521

(ASBCA 47106, findings 1, 10)

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Breach of Contract

4. Contract 817 provided:

> H.3 REQUIREMENTS (APR 1984) FAR 52.216-21 . . . Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.
>
> * * *
>
> C.6 NATURAL GAS REQUIREMENTS . . . The Government shall purchase natural gas for the loads identified in Attachment A exclusively from the offeror or the North Shore Gas Company during the term of this contract.

Attachment B, Rider 16, provided in pertinent part:

> In the event of an interruption or curtailment of deliveries in customer-owned gas supply to the [NSGC], the Company will stand by to make up any deficiency in such supply. Such stand-by service will be made available to the customer under the companion classification, to the same extent it would be available to the customer absent service under this Rider.

(ASBCA 47106, finding 2)

5. NSGC's daily cap prevented CEI from delivering 32,482 decatherms of gas (200,000 decatherms ordered *vs.* 167,518 decatherms delivered) in November 1989, and 43,656 decatherms of gas (125,000 decatherms ordered *vs.* 81,344 decatherms delivered) in July 1990 (ASBCA 47106, findings 8, 13, 15, 17, 21; exhs. G-1Q, G-10; tr. 2/129).

6. For the total of 167,518 decatherms of gas CEI delivered to respondent in November 1989, CEI paid its suppliers: (a) 145,587 decatherms at $2.02/decatherm; (b) 13,977 decatherms at $2.14/decatherm; and (c) 7,954 decatherms at $2.40/decatherm, for an average of $2.04806/ decatherm ($343,086.12 / 167,518)(exhs. G-10, G-2Q at 14, G-20Q). Respondent bought 145,857 decatherms of gas from NSGC in November 1989, including 32,482 decatherms whose delivery the NSGC daily cap prevented on 29-30 November 1989 (ASBCA No. 47106, finding 24; exh. G-10). The record does not show on which day(s) in November 1989 NSGC delivered the other 113,375 decatherms (145,857 - 32,482), or that the GLNTC could have used 113,375 decatherms in 48 hours or less in that month.

7. For July 1990 CEI paid its supplier $1.65/decatherm for delivering to the "City Gate" 81,344 decatherms of gas (exhs. G-2Q at 14, G-20Q).

8. CEI sought to show that respondent purchased 284,384 decatherms of additional classification 2 and 3 gas for GLNTC from People's Gas, Light and Coke (PGLC) in December 1989 (tr. 2/132, 139). Respondent contracted for delivery of natural gas to GLNTC in 1989-90 only from

CEI and NSGC, and had no contract with PGLC (tr. 2/169-70, 222-23). Gas purchased from NSGC was measured on PGLC-owned meters (tr. 2/172-73). We find no evidence that respondent purchased gas from PGLC in December 1989. CEI failed to deliver the quantity of gas ordered for December 1989 when its interruptible orders were bumped off the NGP by cold weather and other actions by NGP (exh. A-K).

9. CEI's president, Lewis R. Dodds, testified that its lost profits for November and December 1989 and July 1990 were $.57729, $.23521 and $.52521 per decatherm, respectively (tr. 2/135). On cross-examination, respondent repeatedly asked Mr. Dodds to explain how he calculated those lost profit amounts (tr. 2/150-65). Mr. Dodds identified no specific figures for costs CEI incurred, but said that, in addition to the costs it incurred for purchasing natural gas from suppliers, and for transporting such purchased gas to the "City Gate," CEI incurred other costs:

> Q. Mr. Dodds . . . am I not correct that your profit is the difference between your contract price for gas and what you were actually paying for gas that month?
>
> A. And my management and a whole bunch of other things.

(Tr. 2/150) The record contains no evidence of the costs of "management" or "a whole bunch of other things," Mr. Dodds' salary, "what counsel was going to cost" (tr. 2/164), or any other overhead or general and administrative costs

incurred by CEI during November and December 1989 and July 1990 or at any other time during performance of contract 817. We find that one cannot determine from this record the amount of profit, measured by the difference between the gas price in contract 817 and all costs CEI incurred to perform and deliver such gas to respondent, which CEI lost in the months of November 1989 and July 1990 on account of gas respondent purchased from other sources.

DECISION

In our entitlement decision we held that respondent "breached contract 817 when NSGC's daily 'cap' prevented CEI from transporting gas to the [GL]NTC in November 1989 and July 1990." ASBCA No. 47106, 96-2 BCA at 142,208. The parties agree that CEI's lost profit on gas not supplied is the measure of damages for such breach.

CEI argues that respondent breached by purchasing gas for GLNTC from PGLC in December 1989. CEI did not prove that respondent bought any gas for GLNTC from PGLC. CEI failed to deliver the gas quantity ordered by respondent for December 1989 when CEI's interruptible orders were bumped off the NGP by cold weather and other actions by NGP. (Finding 10) Respondent is not liable for purchasing stand-by gas in December 1989. ASBCA No. 47106, 96-2 BCA at 142,207-08.

Appellant acknowledged that, in addition to the costs it incurred for purchasing natural gas from suppliers, and for transporting such purchased gas to the "City Gate," it

incurred "management" costs "and a whole bunch of other things" (finding 9). But the record contains no evidence of the costs of "management" or "a whole bunch of other things," Mr. Dodds' salary, legal costs, or any overhead or general and administrative costs incurred by CEI during November and December 1989 and July 1990 or at any other time during performance of contract 817. We found that one cannot determine from this record the amount of profit, measured by the difference between the gas price in contract 817 and all costs CEI incurred to perform and deliver such gas to respondent, which CEI lost in the months of November 1989 and July 1990 on account of gas respondent purchased from other sources. (Finding 9) We hold that CEI has failed to prove the quantum of its claim for respondent's breaches of contract 817.

Transportation Cost Adjustment

10. Contract 817's $0.32521/decatherm price for gas transportation to the "City Gate" was subject to the following provisions:

> C.4 DEVELOPMENT OF GOVERNMENT PRICING STRUCTURE
>
> (a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . . .
>
> First, the city gate prices will be adjusted, up or down, to reflect documented changes in

transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority . . . .

* * *

H.14 TRANSPORTATION PRICE ADJUSTMENTS

A. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply:

(1) If during the term of this contract the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the Section B transportation prices, the Contracting Officer shall amend this contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective.

(ASBCA 47106, finding 2)

11. Natural gas is moved through NGP's interstate pipeline by compressors powered by a portion of such gas introduced into the pipeline, which is called "gas lost and unaccounted for" ("GL&UF") (tr. 1/18, 27).

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12. Transportation rates to ship gas on interstate pipelines are regulated by tariffs approved by the Federal Energy Regulatory Commission (FERC) (tr. 1/18, 2/85). We find that transportation service on such pipelines under contract 817 was under a "regulated tariff." Such tariff rates were higher in November through March ("peak" months) and lower in April through October ("off peak" months) (exh. G-7Q).

13. On 15 September 1989 FERC approved final gas transportation tariffs, retroactive to 1 January 1989. On 1 April 1990 FERC approved NGP's revised transportation tariffs for November 1989 to March 1990. (ASBCA 47106, finding 32)

14. CEI made 24 natural gas deliveries by "interruptible transportation service" under contract 817 from June 1989 to September 1990, and obtained gas one or more times from NGP receipt points (or "clusters") A-11, A-9, A-15, A-12, A-6, A-10, G-8, G-9, A-8ii, A-7, A-1 and A-2, each of which had distinct tariff rates (exhs. A-C, G-20Q; ASBCA 47106, findings 4-5, 33).

15. With respect to those 24 deliveries, the record contains no evidence that: (a) CEI paid any transportation charge directly to NGP; or (b) any of CEI's suppliers billed CEI, or CEI paid to or received from its supplier, an amount corresponding to the difference between the original and the adjusted transportation charge which resulted from FERC's September 1989 or April 1990 gas transportation tariff revisions.

Appendix B

16. The parties stipulated to the accuracy and completeness of the volume of gas CEI delivered at "City Gate," the NGP receipt and delivery clusters, the amended tariff rates for such receipt and delivery clusters, the Gas Research Institute (GRI) and Annual Charge Assessment (ACA) surcharges, and the GL&UF percentages in effect at the times of each of the 24 deliveries set forth in exhibit G-20Q, columns D, E, F, I, J, K and M (tr. 1/8-9; 4 June 1997 stipulation). The parties computed NGP transportation charge adjustments for CEI's 24 deliveries (exhs. A-C, -D, -I, -N, -O, -P; G-3Q, -5Q, -9Q, -11Q, -13Q, -20Q, -21Q, -22Q, -24Q, -30Q).

17. CEI calculated a transportation price adjustment of $200,995.65 (exh. A-D) by comparing: (a) the $.32521/ decatherm contract transportation price, with (b) the so-called "actual" transportation charge paid to CEI's suppliers (subcontractors). CEI substantiated by contemporaneous correspondence the "actual" transportation prices on which it agreed with its suppliers for 15 of the 24 deliveries (exh. A-E). We accord no probative weight to CEI's unsubstantiated allegations of "actual" prices for 9 of the 24 deliveries in exhibits A-C and A-D.

18. CEI calculated transportation price adjustments of $253,591.59 (exh. A-1) and $277,902.25 (exh. A-P) by comparing: (a) the $.32521/decatherm contract transportation price, with (b) the NGP transportation tariff in effect at the time of each delivery as a result of FERC's 1989 and 1990 tariff revisions (tr. 2/114; column "I" of exh. G-20Q). Comparing those same factors, respondent

calculated transportation adjustments of $10,801.57 (exhs. G-3Q, -4Q) and $11,988.57 (exhs. G-5Q, -6Q).

19. CEI calculated a $222,990.62 transportation price adjustment by comparing: (a) the $.32521/decatherm contract transportation price with (b) the NGP transportation charge at the time of award derived from "column T" in respondent's exhibit G-20Q. Several such entries from "column T" were erroneous. (Exh. A-O)

20. Respondent calculated transportation adjustments of ($15,850.50) (exhs. G-13Q, -14Q) and ($17,087.19) (exhs. G-22Q, -23Q) by comparing: (a) the pre-March 1989 NGP (pre-award) tariff, with (b) CEI's so-called "actual" transportation costs (tr. 1/161-62). Figures in parentheses indicate negative amounts.

21. The adjustments described in findings 17-20 did not compare the differences between the pre-award and amended tariffs in effect at the time of each of the 24 deliveries, but rather introduced as factors in the comparison the so-called "actual" transportation charges or the $.32521/ decatherm contract transportation price. We find that such adjustments were not "supported by tariff modifications" which "affect[ed] the actual cost of transportation" as prescribed by clause C.4 (see finding 10).

22. Respondent calculated adjustments of $6,599.03 (exhs. G-11Q, -12Q); $6,559.32 (exhs. G-20Q, -21Q); and ($36,722.04) (exhs. G-24Q, -25Q; tr. 1/162-65) by comparing: (a) the pre-award NGP tariffs in CEI's exhibit A-1, or, in the case of exhibit G-24Q, the "Interim

Settlement Rates" in respondent's exhibit G-15Q, with (b) the amended NGP tariffs in effect at the time of each delivery. Such "Interim Settlement Rates" were compiled during litigation by a Government employee who did not testify, and allegedly corresponded to "Rates attached to letter dated June 20, 1989," which letter is not in evidence. We accord no probative weight to the "Interim Settlement Rates" in exhibit G-15Q, and hence to the calculations in exhibit G-24Q.

23. Exhibit G-11Q calculated gas lost charges from entry cluster gas quantities; exhibit G-20Q calculated gas lost charges from delivery cluster gas quantities (tr. 1/159-60). Exhibit G-20Q's calculations correspond more closely with the formula derivable from NGP's 1 February 1989 "Instructions for Determining Transportation Rates, Charges and Percentages for Fuel Gas and Gas Lost and Unaccounted For Under Interruptible Transportation Service" (ASBCA 47106, R4, tab 6). Respondent's $1.47 "supply price" used for its October 1989 calculations (delivery 7) should have been $1.3382 (tr. 1/142). The column "W" extensions in exhibit G-20Q contain mathematical errors. As corrected, the theoretical adjustment in exhibit G-20Q is $6,585.02.

24. To determine whether any FERC-approved transportation tariff revisions could have affected transportation prices CEI actually incurred for the 24 deliveries, the NGP "Total Transportation Charges" (TTC), NGP Cluster Rates, CEI's "Actual" transportation charges paid and CEI's cluster rates paid to CEI's suppliers at the times of deliveries were:

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Del.	FERC-Amended NGP TTC	TTC Actually Paid by CEI	FERC-Amended NGP Cluster Rate	Cluster Rate Actually Paid by CEI
1	.3479	.3531	.2384	.2575
2	.3483	.3531	.2509	.2511
3	.4219	NPE*	.2807	.2830
4	.2485	NPE	.1894	.1856
5.	.3607	NPE	.2509	.2511
6.	.3201	NPE	.2208	.2191
7.	.4346	.4118	.3138	.3182
8.	.3467	.3407	.2509	.2511
9.	.4555	.4207	.3291	.3239
10.	.3088	NPE	.2550	NPE
11.	.3059	NPE	.2550	NPE
12.	.4811	NPE	.3451	NPE
13.	.3188	.3116	.2550	.2666
14.	.3151	NPE	.2550	NPE
15.	.5773	.5600	.3874	.3874
16.	.4626	.4639	.3451	.3451
17.	.3069	NPE	.2550	NPE
18.	.3075	.3103	.2550	.2550
19.	.5107	.4982	.3896	.3896
20.	.4738	.4592	.3605	.3605
21.	.4198	.4166	.3194	NPE
22.	.3985	.3256	.3023	NPE
23.	.3933	.3924	.3023	NPE
24.	.3938	.3929	.3023	NPE

(Exhs. G-20Q, columns "I" and "U", A-E)

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* "NPE" = No Probative Evidence in the record.

Appendix B

25. We further find that the: (a) record contains no evidence of the amounts CEI paid for the TTC or for cluster rates for deliveries 10-12, 14, and 17; (b) amounts CEI incurred for the TTC and for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP TTC and NGP pertinent amended cluster rates for deliveries 1, 2, 16 and 18; (c) amounts CEI incurred for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP pertinent cluster rates for deliveries 3, 5, 7, 8, 13, 15, 19 and 20; and (d) differences between the pre-award and time of delivery TTCs or Cluster Rate charges, decatherms delivered, and corresponding adjustment per delivery (award/delivery difference times decatherms delivered) were:

Del.	Award/Delivery Difference	Decatherms Delivered	Adjustment
1	0	128,301	0
2	.0128	123,776	$1,584.33
3	.0130	67,127	872.65
5	.0128	28,105	359.74
7	.0132	60,324	796.28
8	.0128	109,674	1,403.83
13	(.0117)	3,388	(39.64)
15	(.0123)	270,000	(3,321.00)
16	(.0122)	150,920	(1,841.22)
18	(.0117)	250,015	(2,925.18)
19	.0133	185,000	2,460.50
20	.0133	135,000	1,795.50
Total Adjustment:			$1,145.79

(Exh. G-20Q, columns "V," "D" and "W," as corrected)

Appendix B

DECISION

The requirements for amending the transportation price prescribed in contract clauses C.4 and H.14 were that the tariff changes must: (1) "affect the actual cost of transportation to the city gate," (2) be "supported by tariff modifications" authorized by the applicable regulatory authority, which resulted in "higher or lower rates."

The most direct method of proving adjustments for changed gas transportation tariff rates in compliance with the foregoing requirements would be the documented payment by CEI of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions. This record has no such evidence (finding 15).

In lieu of such direct evidence, the parties sought to reconstruct and to compare, from the various FERC-approved transportation tariffs, what the transportation charges were at the time of contracting in March 1989 and at the time of making each of the 24 gas deliveries from June 1989 through September 1990. Most such calculations compared original or revised tariffs with purported "actual" transportation charges paid to CEI's gas suppliers, or compared the original tariff charges with the contract transportation price of $0.32521/decatherm (findings 17-20). Such comparisons were invalid because: (1) CEI only substantiated the "actual" transportation prices of 15 deliveries by contemporaneous correspondence, and we accorded no probative weight to the remaining 9 unsubstantiated assertions (finding 17); and (2) such

adjustments did not compare the differences between the pre-March 1989 tariffs in effect at the time of contracting and revised tariffs in effect at the time of each delivery. Thus, such adjustments were not "supported by tariff modifications" which "affect[ed] the actual cost of transportation to the city gate" as required by clause C.4 (finding 21).

Only respondent's exhibits G-11Q, G-20Q, and G-24Q compared the differences between the pre-March 1989 tariffs and the amended tariffs in effect at the time of each gas delivery. Exhibit G-24Q used "interim Settlement Rates" to which we accorded no probative weight, so we disregarded that calculation. (Finding 22) Exhibit G-11Q calculated gas lost charges from entry cluster quantities; exhibit G-20Q calculated such charges from delivery cluster gas quantities. The exhibit G-20Q calculations correspond more closely with the formulae in NGP's 1 February 1989 "instructions for Determining Transportation Rates" (finding 23). Exhibit G-20Q shows the theoretical original and amended transportation charges payable to transport gas on the NGP; they do not show what CEI actually incurred for such transportation charges.

We have compared the theoretical NGP Total Transportation Charges (TTC) and Cluster Rates with CEI's "Actual" transportation charges and pertinent cluster rates paid to its suppliers at the times of the 24 deliveries. The record contains no evidence of the amounts CEI paid for the TTC or for cluster rates for deliveries 10-12, 14, and 17. The amounts CEI incurred for the TTC and for the Cluster Rate on account of amended transportation tariffs

equaled or exceeded the NGP TTC and NGP pertinent amended cluster rates for deliveries 1, 2, 16 and 18. The amounts CEI incurred for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP pertinent cluster rates for deliveries 3, 5, 7, 8, 13, 15, 19 and 20. The resulting transportation cost adjustment was a net $1,145.79 for those deliveries where CEI proved that it paid an amount equal to or in excess of the pertinent NGP TTC or Cluster Rate. (Finding 25) We hold that CEI is entitled to recover $1,145.79 as a transportation price adjustment.

Conclusion. We sustain the appeal to the extent of $1,145.79, with Contract Disputes Act interest thereon from the date the contracting officer received the claim, and deny the balance thereof.

Dated: 26 January 1998

s/ David W. James, Jr.
DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I *concur*

s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I *concur*

s/ Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

Supreme Court, U.S.
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AUG 23 1999
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No. 98-1970

In the Supreme Court of the United States

COMMERCIAL ENERGIES, INC., PETITIONER

v.

RICHARD DANZIG, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Armed Services Board of Contract Appeals did not abuse its discretion in calculating the amount of a transportation rate adjustment due under a natural gas contract between petitioner and the Department of the Navy.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 11a-27a) is reported at 98-1 B.C.A. (CCH) ¶ 29,549. An earlier opinion of the Armed Services Board of Contract Appeals is reported at 96-2 B.C.A. (CCH) ¶ 28,474.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1999. The petition for a writ of certiorari was filed on June 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 24, 1989, the Department of the Navy awarded petitioner a requirements contract to supply

natural gas for the Great Lakes Naval Training Center in Illinois through September 23, 1990. The gas was to be delivered to the "City Gate," the point of gas delivery from the interstate pipeline of the Natural Gas Pipeline Company of America (NGP) into the local distribution system of the North Shore Gas Company at Grayslake, Illinois. Pet. App. 2a, 12a.

Petitioner obtained the gas for the Naval Training Center from several vendors. Those vendors delivered gas from their repositories to NGP at various "insertion points" along its interstate pipeline. The gas was then transported along the NGP pipeline to the City Gate, where the gas was delivered into the North Shore Gas local distribution system. From there, the gas was delivered to the Naval Training Center. Pet. App. 18a-19a.

2. During the performance of the contract, disputes arose between petitioner and the Navy regarding, among other things, whether the Navy breached the contract during certain months when petitioner was unable to deliver the full amount of gas required by the Naval Training Center and whether petitioner was entitled to an adjustment in transportation rates under the contract. The Armed Services Board of Contract Appeals (the Board) conducted a bifurcated proceeding, the first phase of which concerned whether the Navy was liable to petitioner.

a. *The breach of contract issue.* The contract between petitioner and the Navy provided that the Naval Training Center was to obtain gas only from petitioner or North Shore Gas. The contract further provided that the Naval Training Center could obtain gas from North Shore Gas only in the event of an "interruption" or "curtailment" of the gas supplied by petitioner. Pet. App. 2a-3a, 13a.

In a separate contract, to which petitioner was not a party, the Navy and North Shore Gas established daily caps on the maximum amount of gas that could be delivered to the Naval Training Center through the North Shore Gas distribution system. Pet. App. 2a. In November 1989 and July 1990, petitioner was unable to deliver the full amount of gas ordered by the Naval Training Center because of those caps. *Id.* at 14a.

The Board determined that the Navy had breached the contract with petitioner during those months when, as a result of the delivery caps contained in the contract between the Navy and North Shore Gas, petitioner was unable to deliver the entire amount of gas requested by the Naval Training Center. *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) ¶ 28,474, at 142,208 (1996); see Pet. App. 3a, 16a.

b. *The transportation rates issue.* The price of the gas that petitioner provided to the Naval Training Center consisted of two components: the price of the gas itself plus the price of transporting the gas through NGP's interstate pipelines to the City Gate. The contract provided a fixed transportation price of $0.32521 per decatherm of gas. Pet. App. 4a, 12a.

The contract between petitioner and the Navy contained two provisions—Section C.4 and Section H.14—that together governed adjustments in the gas transportation price. Section C.4, titled "Development of Government Pricing Structure," provided, in pertinent part:

> (a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . .

> First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority.

Pet. App. 17a-18a. Section H.14, titled "Transportation Price Adjustments," provided for an adjustment to the transportation prices specified in the contract if "the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the * * * transportation prices." *Id.* at 5a-6a.

The Federal Energy Regulatory Commission (FERC) sets tariff rates for the transportation of gas along interstate pipelines. The tariff rates reflect, among other things, the distance that gas must be transported. On September 15, 1989, after the Navy awarded the contract to petitioner, FERC approved revised tariff rates retroactive to January 1, 1989. On April 1, 1990, FERC approved further revised tariff rates retroactive for the period November 1989 to March 1990. Pet. App. 19a.

The Board determined that petitioner was "entitled to a transportation price adjustment for each month in which a documented NGP tariff revised by FERC increased or decreased [petitioner's] transportation costs." *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,208; see Pet. App. 2a-3a, 6a, 11a.

3. In the second phase of the bifurcated proceeding, the Board considered the amount of compensation, if any, to which petitioner is entitled. Pet. App. 11a-27a.

First, on the breach of contract issue, the Board concluded that petitioner's recovery, if any, would be

limited to its net lost profits in November 1989 and July 1990, the months during which the North Shore Gas delivery caps precluded petitioner from delivering the full amount of gas requested by the Naval Training Center.[1] The Board then concluded that petitioner had failed to prove the amount of any net lost profits and, accordingly, denied petitioner any recovery for breach of contract. Pet. App. 16a-17a.

Second, on the transportation price adjustment issue, the Board interpreted the contract, specifically Section C.4 and Section H.14, to authorize an adjustment only when petitioner's actual transportation costs were affected. The Board noted that the best evidence of such an effect would be a comparison between petitioner's actual transportation costs at the time of the contract award and petitioner's actual transportation costs after the tariff increases took effect. The Board determined, however, that the record did not contain such evidence. Accordingly, the Board, using figures stipulated between the parties, conducted a comparison based upon "theoretical" transportation costs at the time of the contract award and at the time of the deliveries. Using that method of calculation, the Board determined that petitioner is due a total price adjustment of $1145.79. Pet. App. 26a-27a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-10a.

The court first upheld the Board's decision denying petitioner any recovery for the Navy's breach of con-

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[1] The Board rejected petitioner's claim that the Navy breached the contract in December 1989 by purchasing gas from People's Gas, Light and Coke Company, finding that the record contained no evidence of any such purchases by the Navy during the period in question. Pet. App. 14a-15a.

tract. The court concluded that the Board had not abused its discretion in limiting petitioner's recovery for the breach of contract to its net lost profits, because "[a]llowing [petitioner] to recover its gross profits would potentially overcompensate [petitioner] for any harm it suffered." Pet. App. 7a. The court, referring to "evidentiary deficiencies," then found that petitioner had "point[ed] to nothing in the record allowing the calculation of net profits." *Id.* at 8a.[2]

The court then upheld the Board's calculation of petitioner's transportation rate adjustment. The court rejected petitioner's argument that the Board should have calculated the transportation rate adjustment by comparing the transportation rate set forth in the contract with the revised FERC tariff rates. The court noted that the contract provided for an increase in the transportation rate only if an increase occurred in petitioner's actual costs of transporting gas. A comparison of the revised tariff rates to the contract price would not reveal whether petitioner's transportation costs increased, the court explained, because "[t]he contract price is the price paid by the Navy to [petitioner], not by [petitioner] to its suppliers." Pet. App. 9a.

The court recognized that petitioner had failed to provide the Board with what would have been the best evidence of the increase in petitioner's transportation costs—*i.e.*, "evidence of payments by [petitioner] to its

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[2] The court also upheld the Board's determination that the Navy had not breached the contract during December 1989. The court noted that petitioner had failed to identify any evidence that in December 1989, as in November 1989 and July 1990, the amount of gas that petitioner was able to deliver to the Naval Training Center was affected by the caps in the Navy's contract with North Shore Gas. Pet. App. 9a.

suppliers of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revision"—and that the Board had therefore attempted to approximate the increase by comparing "the theoretical transportation rates at the time of contract award (based on the then-applicable FERC tariffs) with those at the time of delivery (based on the revised FERC tariffs)." Pet. App. 10a. The court concluded that the Board had not abused its discretion in using that methodology, which the court found "adequately capture[d] the effect of the tariff revisions on [petitioner]," and that the theoretical transportation rates used by the Board were supported by substantial evidence. *Ibid.*

ARGUMENT

The decision of the Federal Circuit is correct, does not conflict with any decision of this Court or any other court of appeals, and presents no question of recurring significance. The decision instead turns entirely on the particular facts of this case. This Court's review is therefore not warranted.

1. Petitioner principally challenges the methodology used by the Board, and held not to be an abuse of discretion by the court of appeals, to calculate the transportation price adjustment under the contract.

The contract between petitioner and the Navy provided for an increase in the transportation price "to reflect documented changes in transportation rates to the city gate, *provided that such changes affect the actual cost of transportation to the city gate*" and are "supported by tariff modifications authorized by the applicable Federal, State or local regulatory authority." Pet. App. 17a-18a (emphasis added). As the Board and the court of appeals recognized, in order to determine

whether petitioner was entitled to an increase in the transportation price that could be charged the Navy, and the amount of any such increase, the Board had to determine the extent to which petitioner's "actual cost" of transporting natural gas to the City Gate increased due to tariff increases after the contract award. Petitioner appears to dispute that construction of the contract. See, *e.g.*, Pet. 13 (suggesting that "[i]f the tariff rate went up or down, the Petitioner's recovery would be adjusted accordingly," apparently without regard to whether petitioner's actual costs had increased). But petitioner cites no contractual language to support its contrary construction.

Petitioner essentially concedes that it provided the Board with no "direct evidence, *i.e.*, proof of payment by Petitioner to its suppliers," (Pet. 10) to establish any actual increase in its transportation costs. See Pet. App. 25a (noting the absence of any direct evidence in the record of increases in petitioner's actual costs, such as the "documented payment by [petitioner] of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions"). In such circumstances, the Board reasonably chose to approximate the increase in petitioner's costs, using "theoretical" transportation costs that reflected the tariff rates applicable at the time of the contract award and at the time of the gas deliveries. See *id.* at 26a-27a. The Board's methodology, unlike petitioner's, gave effect to the contract provision that petitioner would be permitted to charge the Navy more for transporting gas only if petitioner paid more to transport the gas due to a tariff revision. There is no reason to disturb the court of appeals' conclusion that the Board's methodology "adequately capture[d] the effect of the tariff revisions on [peti-

tioner]" and did not constitute an abuse of discretion in the circumstances of this case. *Id.* at 10a.

Petitioner argues (Pet. 10, 15) that its methodology, using as a basis the contract transportation rate of $0.32521 per decatherm, is "in accordance with industry standards" and should have been accepted by the Board. But the central question here is not which methodology was more consistent with industry standards. It is which methodology was consistent with the contract. Petitioner's methodology was not consistent with the requirements of the contract, which permitted petitioner to increase its transportation price only upon an actual increase in petitioner's transportation costs. As the court of appeals explained, a comparison of the contract transportation price with the revised tariff rates "bears no relationship to this purpose," because "[t]he contract price is the price paid by the Navy to [petitioner], not by [petitioner] to its suppliers." Pet. App. 9a. Using the contract price could "overcompensate[] [petitioner] for changes in the FERC tariffs," *ibid.*, because petitioner could recover even if its actual costs of transportation remained unchanged.

Petitioner repeatedly claims (Pet. 5, 9-10, 11-12) that the Board "changed the test" for determining the amount of any transportation price adjustment between its first and second decisions in this bifurcated proceeding. Petitioner asserts (Pet. 4) that the Board held in its first decision that "the amount of damages due for the transportation price adjustment for each month in which a FERC tariff revision occurred was to be measured by the documented tariff revision(s)." Petitioner misreads the Board's decision. In fact, the Board stated in its first decision that petitioner was "entitled to a transportation price adjustment for each month in which a documented NGP tariff revised by FERC

increased or decreased CEI's [*i.e.*, petitioner's] transportation costs." *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,208. The Board thus appears to have understood from the outset that petitioner could obtain an increase in the transportation price set forth in the contract only if petitioner established an increase in its transportation costs. Understandably, given that the Board was not concerned in that decision with the calculation of whatever transportation price adjustment might be due petitioner, the Board did not further elaborate upon how that calculation was to be made.

2. Petitioner also contends (Pet. 11) that the Board's methodology for determining the transportation price adjustment "is contrary to the filed rate doctrine." Petitioner did not raise any such contention before either the Board or the court of appeals. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield*, v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); accord *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). No exception to that rule is warranted here.

This Court has explained that "[t]he 'filed rate doctrine' prohibits a federally regulated seller of natural gas from charging rates higher [or lower] than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573 (1981); see also *id.* at 577 (explaining that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority"). It is unclear whether petitioner is a "regulated seller of natural gas," and thus subject to the filed rate doctrine, as opposed to a mere conduit between suppliers and end users. Cf. Pet. 1 (stating that "[t]his Contract represented the

first time [the Navy] had ever purchased natural gas and transportation on an interstate pipeline other than directly from a regulated utility").[3] In any event, the contract in this case, as construed by the Board, gave effect to the filed rate doctrine by permitting petitioner to charge the government more for transporting gas in the event of a tariff increase, albeit only if the tariff increase actually affected petitioner's costs of transporting the gas.

3. In the body of the petition (Pet. 17, 18), although not in the question presented, petitioner contends that it was entitled to an award of damages for the Navy's breach of contract during November 1989 and July 1990. That claim, even if properly presented, is wholly fact-bound. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

The appropriate measure of damages for breach of contract is the amount necessary "to put the injured party in as good a position as that in which he would have been put *by full performance of the contract.*" *Northern Helex Co.* v. *United States*, 524 F.2d 707, 713 (Ct. Cl. 1975) (citing Restatement of Contracts § 329 cmt. a (1932)) (emphasis added), cert. denied, 429 U.S.

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[3] Petitioner's own successful bid on the contract at issue, which was not identical to the applicable tariffs in effect at the time, suggests that petitioner did not then consider itself subject to the filed rate doctrine. See *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,206 (observing that petitioner's "proposed $.32521/decatherm transportation price for [the contract] was based on NGP receipt point A[-]6 and delivery point A-20 (the 'City Gate')," whereas "the authorized tariffs from NGP receipt point A-6 to delivery point A-20 were $.4286/decatherm for November through March and $.3182/decatherm for April through October, with a 6.54% loss factor").

806 (1976). Petitioner was not entitled to receive anything more than the net profits that it would have received absent a breach. As the court of appeals recognized, "[a]llowing [petitioner] to recover its gross profits would potentially overcompensate [petitioner] for any harm it suffered." Pet. App. 7a.

The Board recognized that, in order to determine petitioner's net profits, all of the costs that petitioner would have incurred in obtaining and delivering the additional gas requested by the Navy in November 1989 and July 1990 would have to be subtracted from the gross revenue that petitioner would have received from selling that additional gas to the Navy. Pet. App. 17a.[4] During the hearing before the Board, petitioner's president acknowledged, in general terms, that petitioner incurred a variety of costs in providing gas to the Navy, including "management" costs "and a whole bunch of other things." *Id.* at 15a. But petitioner failed to adduce the proof necessary to quantify those costs. *Id.* at 15a-16a. The Board thus concluded that "one cannot determine from this record the amount of profit, measured by the difference between the gas price in

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[4] Petitioner argues (Pet. 8) that the "proper test" for determining lost profits was "to determine the volume of gas purchased during the month in issue and then multiply the volume by the difference between the cost and contract price." The Board and the court of appeals correctly rejected that methodology, which essentially would have allowed petitioner to recover its gross profits. Indeed, the court of appeals noted that it could not justify petitioner's claim based upon petitioner's own cost information. It observed, for example, that petitioner had asserted a profit of $0.52521 per decatherm for July 1990 even though the difference between its contract price and the purchase price for natural gas that it could not deliver due to the cap was only $0.20 per decatherm. Pet. App. 7a-8a n.2.

[the contract] and all costs [petitioner] incurred to perform and deliver such gas to [the Navy], which [petitioner] lost in the months of November 1989 and July 1990." *Id.* at 16a. Based upon that failure of proof, the Board declined to make an award of damages to petitioner for breach of contract (*id.* at 17a), a decision that the court of appeals held was not an abuse of discretion (*id.* at 7a). Petitioner has offered no persuasive reason for concluding otherwise.

Petitioner contends (Pet. 9) that the decision to deny any award of lost profit damages is inconsistent with *Freeman General, Inc.* v. *United States*, No. 90-1025, 1990 WL 165558 (Fed. Cir. Oct. 31, 1990) (noted at 918 F.2d 188 (Table)). An asserted conflict between two unpublished decisions of the same court of appeals is not a matter that merits this Court's attention. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor does any conflict actually exist. In *Freeman General*, although the contractor was unable to document its increased costs of performing the required work due to unanticipated site conditions, the record contained evidence that the government had estimated the claim for the extra work at $78,383. The court of appeals held that the Board "erred in refusing to consider this evidence." 1990 WL 165558, at *1. The record in this case contained no similar evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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